Before the
Administrative Hearing Commission
State of Missouri

FIVE DELTA ALPHA, LLC,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 11-1721 RS
	)	
DIRECTOR OF REVENUE,	)	
	)	
Respondent.	)	

DECISION

Five Delta Alpha, LLC ("FDA") is not entitled to a refund of Missouri use taxes.

Procedure

FDA filed its complaint on August 22, 2011. The Director filed an answer on September 19, 2011. The parties filed joint proposed findings of fact, with attached exhibits, on November 1, 2012. FDA filed proposed findings of fact and conclusions of law and a legal brief on November 15, 2012. The Director filed a statement of the case, proposed findings of fact, conclusions of law, and brief on February 15, 2013. FDA filed a reply brief on March 4, 2013.

FDA filed a request for oral argument on March 5, 2013. We granted the motion and the parties presented oral argument to Commissioner Nimrod T. Chapel, Jr., on April 3, 2013. Paul V. Herbers, James E. Cooling, and Jessica Pownell of Cooling & Herbers, P.C., represented FDA at oral argument. Spencer Martin, Legal Counsel with the Department of Revenue, represented

the Director. The matter became ready for decision on April 18, 2013, the date the transcript of the oral argument was filed.

Commissioner Sreenivasa Rao Dandamudi, having read the full record including all the evidence, renders the decision.[1]

Findings of Fact

1. At all relevant times, FDA was a Missouri limited liability company with its principal place of business in Kansas City, Missouri.

2. FDA purchased a Bombardier Inc. BD-100-1A1O aircraft, serial number 20304, United States Federal Aviation Administration ("FAA") Registration Number N21FDA ("the Aircraft") from Bombardier Aerospace Corporation ("Bombardier") on March 8, 2011 in Wichita, Kansas. The Aircraft had the capacity to carry two pilots and up to nine passengers.

3. FDA leased the Aircraft to JetSelect, LLC ("JetSelect") by an agreement dated February 28, 2011, effective March 8, 2011. The lease commenced in Wichita, Kansas.

4. The Aircraft entered Missouri after its purchase and lease to JetSelect for air carrier operations. The Aircraft was then, at all relevant times, based in Kansas City, Missouri.

5. FDA purchased the Aircraft solely for lease to JetSelect. The pilots that operated the plane were JetSelect employees. JetSelect provided oversight of all mechanics, maintenance, parts, and other personnel and supplies necessary for the operation of the Aircraft in accordance with Federal Air Regulation ("FAR") Part 135 air carrier requirements (14 C.F.R. §§ 135.1 et seq.).

6. FDA paid Missouri use tax in the amount of $1,396,083.33 under protest on April 29, 2011.

[1] Section 536.080.2; ***Angelos v. State Bd. of Regis'n for the Healing Arts***, 90 S.W.3d 189 (Mo. App., S.D. 2002). Statutory references are to RSMo 2000 unless otherwise indicated.

7. FDA filed a Sales Tax Protest Payment Affidavit with the Director on June 15, 2011.

8. The Director denied the Sales Tax Protest Payment Affidavit by letter dated June 24, 2011.

9. At all relevant times, JetSelect routinely provided air carrier service for a passenger or group of passengers, for hire in interstate commerce, throughout the United States. JetSelect operated from 13 different locations in major markets throughout the United States, including Kansas City, Missouri, with a fleet of 24 jet aircraft available for hire. JetSelect was open for business 24 hours a day, 7 days a week. JetSelect offered to have an aircraft available to pick up any customer in the United States within 2 hours of the request.

10. JetSelect marketed, for hire, its air carrier services to the public by Web and print advertising, and conduct. These marketing methods included the following:

- JetSelect's website, www.jetselectaviation.com, which offered "Worldwide Private Jet Charter and Flight Services." Potential customers could request a quote for jet service through the website. The Aircraft was advertised specifically on a page of JetSelect's website;

- JetSelect published and distributed a full-color brochure of its offerings;

- JetSelect placed advertisements in various publications, such as The Wall Street Journal, the Air Charter Guide (www.aircharterguide.com) and Jet Charters (www.jetcharters.com), soliciting customers;

- JetSelect promoted its services through the National Business Aircraft Association ("NBAA") Product & Services Directory, and specifically through Web advertising on the NBAA directory of air charter operators;

- JetSelect used listings with clearinghouse services such as CharterX (see www.charterx.com) and Avinode (see www.avinode.com), both of which were resources for charter customers;

- JetSelect promoted its aircraft through social networking media including Twitter.com and Facebook.com. JetSelect's Facebook postings were published to current and prospective customers;

- JetSelect prepared and published an advertisement on YouTube.com.

11. JetSelect regularly operated the Aircraft on air carrier flights since March 2011. As of December 31, 2011, JetSelect had operated the Aircraft over 100 hours and 44,000 statute air miles, and continued to operate the Aircraft in interstate air carrier service routinely.

12. Potential customers contacted JetSelect either directly (by phone, website, e-mail or in person) or through a broker to arrange for air carrier service. The customer provided the information necessary to determine the price, such as the point of departure, desired destination, number of legs, date and time of departure, and potential passenger list.

13. JetSelect, based on the information provided by the customer, would create a price quote for air carrier service based on a published hourly rate of $4,750 for the Aircraft. Once the customer signed the price quote and returned it to JetSelect, it constituted an agreement between the customer and JetSelect.

14. JetSelect negotiated the price of the published hourly rate for flights under certain circumstances, such as for a regular or priority customer.

15. JetSelect accommodated a customer's request for flight time to the best of its ability. JetSelect had operational control of all flights and set a flight time in accordance with several factors, including crew duty time requirements, air traffic control time slots, commitments to other flights, and weather. If a customer asked for the flight time to be changed, JetSelect made every attempt to accommodate the request if possible.

16. JetSelect had to comply with Part 135 of the FAR as well as restrictions of the United States Transportation Security Administration ("TSA") under 49 C.F.R., Subchapter C, in approving passengers. Within these limitations, JetSelect accommodated a customer's request regarding passengers. If a customer changed the passenger list, JetSelect accommodated this if possible.

17. Once a customer purchased a flight from JetSelect, JetSelect did not offer passage to any other potential customer on the same flight because the first customer had purchased the use of the entire aircraft, including any empty seats. Any additional passenger on that flight would only be at the invitation of the customer.

18. JetSelect accepted all customers who agreed to abide by the conditions of carriage and pay the charges as quoted as long as there was an empty aircraft available to transport the customer or group.

19. JetSelect never refused to carry any prospective customer once that customer had made payment of the charges quoted, as long as there was an empty aircraft available to transport the customer or group.

20. JetSelect provided air transportation to paying customers on an on-demand basis rather than by way of regularly scheduled flights.

21. JetSelect held itself out to the general public as engaging in the transportation of passengers or property for hire under individual agreements without refusal if the fare or charge was paid and there was an empty aircraft available to transport the customer or group.

Conclusions of Law

This Commission has jurisdiction over appeals from the Director's final decisions.[2] FDA bears the burden of proving that it is entitled to the state use tax exemption.[3] An exemption is allowed only upon clear and unequivocal proof, and doubts are resolved against the party claiming it.[4] Exemptions are interpreted to give effect to the General Assembly's intent, using the plain and ordinary meaning of the words.[5] Although tax exemptions are to be strictly '

[2]Section 621.050.1.
[3]***Branson Props. USA v. Director of Revenue***, 110 S.W.3d 824, 825-26 (Mo. banc 2003).
[4]*Id*.
[5]*Id*.

construed against the taxpayer, that requirement should not nullify the legislative purpose in making the exemption available.[6] Our duty in a tax case is not merely to review the Director's decision, but to find the facts and to determine, by the application of existing law to those facts, the taxpayer's lawful tax liability for the period or transaction at issue.[7]

Evidentiary Objections

In a joint proposed stipulation of proposed findings of fact, the parties attached, referred to, and stipulated to the admissibility of Exhibits A through N. FDA also attached Exhibits O through R. The Director objected to their admission on grounds of relevance. Evidence in a contested case is relevant when it tends to prove or disprove a fact in issue or corroborates other relevant evidence that bears on the principal issue.[8]

Exhibit O is an FAA Advisory Circular that, by its terms, "furnishes FAA personnel and interested segments of industry with general guidelines for determining whether current or proposed transportation operations by air constitute private or common carriage"—in other words, whether an air carrier is a common carrier. The Director argues that it is irrelevant because the particular issue in this case is whether JetSelect is a common carrier under Missouri law. While the analysis contained in the exhibit shows the similarity between the definitions of common carrier stated there and those stated in Missouri law, it neither proves nor disproves whether JetSelect was a common carrier under Missouri law, nor does it corroborate other, relevant evidence on that or any issue; therefore, it is irrelevant. We sustain the Director's objection.

[6] ***State ex rel. Ozark Lead Co. v. Goldberg***, 610 S.W.2d 954, 957 (Mo. 1981).
[7] ***J.C. Nichols Co. v. Director of Revenue***, 796 S.W.2d 16, 20-21 (Mo. banc 1990).
[8] ***Kendrick v. Board of Police Comm'rs of Kansas City***, 945 S.W.2d 649, 654 (Mo. App., W.D. 1997); ***Gardner v. Missouri State Highway Patrol Superintendent***, 901 S.W.2d 107, 116 (Mo. App., W.D. 1995).

Exhibit P consists of copies of pages from the website for priceline.com. FDA offers this exhibit in support of its argument that both commercial airlines and JetSelect, on occasion, negotiate prices and terms of air transport services with their respective customers. FDA made this argument in response to the Director's argument that JetSelect was not a common carrier because it negotiated prices and terms with its customers.

Exhibit Q is a copy of a form contract of carriage of Southwest Airlines. FDA offers this exhibit in support of its argument that acknowledged common carriers such as Southwest Airlines also entered into contracts with its customers. FDA made this argument in response to the Director's argument that JetSelect was not a common carrier because it entered into individual agreements with its customers.

However, we follow the Supreme Court's analysis of whether a carrier is a common carrier as set out below in "The Supreme Court's Analysis of 'Common Carrier.'" Neither that analysis, nor any of the authorities cited there, refers to price negotiation as a consideration for common carrier status. Because we disagree with the Director's argument – that JetSelect was not a common carrier because it entered into individual agreements with its customers[9] – we need not consider FDA's counterargument, and therefore sustain the Director's objections to Exhibits P and Q.

Exhibit R is a copy of a proposed air charter contract between Delta Private Jets, Inc., and one of that company's potential customers. FDA offers this exhibit in support of its argument that an affiliate of an acknowledged common carrier (Delta Airlines) also operated an FAA-certificated Part 135 charter air carrier. We sustain the Director's objection because FDA failed to show the relevance of the exhibit or the underlying argument.

[9] See "The fact that FDA enters into individual agreements with its customers does not disqualify FDA from being a common carrier" below.

Summary of the Parties' Arguments

The parties' arguments suggest that the primary issue in this case is whether the taxpayer's lessee, JetSelect, was a common carrier under Missouri law. FDA, the taxpayer, argues that because JetSelect meets the definition of a common carrier, it (FDA) is entitled to the exemption. The Director disagrees, arguing primarily that JetSelect was a contract carrier and therefore could not be a common carrier. While we agree with the parties that the common carrier issue is an important one, there is a second issue that is equally important -- whether FDA is entitled to claim the common carrier exemption if its lessee, JetSelect, is a common carrier. Because JetSelect's common carrier status is a prerequisite to FDA's right to claim the common carrier exemption, we consider the common carrier issue first.

The Statutory Grounds for Imposing Use Tax and the Exemption from Such Tax

Section 144.610.1[10] imposes a use tax "for the privilege of storing, using or consuming within this state any article of tangible personal property." FDA claims the exemption to that tax under § 144.030.2(20),[11] which provides in relevant part:

> 2. There are also specifically exempted from the provisions of the local sales tax law as defined in section 32.085, section 238.235, and sections 144.010 to 144.525 and 144.600 to 144.761 and from the computation of the tax levied, assessed or payable pursuant to the local sales tax law as defined in section 32.085, section 238.235, and sections 144.010 to 144.525 and 144.600 to 144.745:
>
> * * *
>
> (20) All sales of aircraft to common carriers for storage or for use in interstate commerce[.]

The exemption of § 144.030.2(20) is incorporated into the use tax pursuant to § 144.615(3),[12] which provides:

[10] RSMo Supp. 2010.
[11] RSMo Supp. 2010. Subdivision (20) was renumbered as (21) by 2012 H.B. 1402.
[12] RSMo Supp. 2010.

> There [is] specifically exempted from the taxes levied in sections 144.600 to 144.745:
>
> * * *
>
> (3) Tangible personal property, the sale or other transfer of which, if made in this state, would be exempt from or not subject to the Missouri sales tax pursuant to the provisions of subsection 2 of section 144.030[.]

Is JetSelect a common carrier for purposes of § 144.030.2(20)?

FDA cites Missouri case law, Missouri statutes, 12 CSR 10-110.300(2)(A), [13] and one of this Commission's prior decisions in support of its argument that JetSelect is a common carrier under Missouri law.

The Definitions of "common carrier" for Purposes of § 144.030.2

The parties, the Supreme Court, and this Commission have, at various times, applied definitions of "common carrier," "contract carrier," and "private carrier" that are found in § 390.020, 12 CSR 10-110.300(2), *Black's Law Dictionary*, and *Webster's Third New Int'l Dictionary*. As the Supreme Court points out in ***Cook Tractor Co. v. Director of Revenue***[14] and ***Balloons Over the Rainbow v. Director of Revenue***,[15] those definitions must be used because § 144.030 does not define "common carrier."

Section 390.020(6), (7), and (23)[16] provide in relevant part:

> As used in this chapter, unless the context clearly requires otherwise, the words and terms mean:
>
> * * *
>
> (6) "Common carrier", any person which holds itself out to the general public to engage in the transportation by motor vehicle of

[13] All references to the CSR are to the Missouri Code of State Regulations as current with amendments included in the Missouri Register through the most recent update.

[14] 187 S.W.3d 870, 873 (Mo. banc 2006).

[15] No. SC 93039, __ S.W.3d __, 2014 WL 1499535 (Mo. banc, Apr. 15, 2014).

[16] RSMo Supp. 2010.

> passengers or property for hire or compensation upon the public highways and airlines engaged in intrastate commerce;
>
> (7) "Contract carrier", any person under individual contracts or agreements which engage in transportation by motor vehicles of passenger or property for hire or compensation upon the public highways;
>
> * * *
>
> (23) "Private carrier", any person engaged in the transportation of property or passengers by motor vehicle upon public highways, but not as a common or contract carrier by motor vehicle; and includes any person who transports property by motor vehicle where such transportation is incidental to or in furtherance of his commercial enterprises[.]

Regulation 12 CSR 10-110.300(2) defines those terms as follows:

> (A) *Common carrier*--any person that holds itself out to the public as engaging in the transportation of passengers or property for hire. A common carrier is required by law to transport passengers or property for others without refusal if the fare or charge is paid. To qualify as a common carrier, a carrier must be registered as a common carrier with all agencies that require such registration, such as the United States Department of Transportation.
>
> (B) *Contract carrier*--any person under individual contracts or agreements that engages in transportation of passengers or property for hire or compensation. A contract carrier is a carrier that meets the special needs of certain customers to transport its passengers or property.
>
> * * *
>
> (E) *Private carrier*--any person engaged in the transportation of passengers or its property, but not as a common carrier or a contract carrier.

Webster's Third New International Dictionary (unabr. 1993) defines a "common carrier" in relevant part as "a carrier offering its services to all comers ...."[17] *Black's Law Dictionary* (9th ed. 2009) states that a common carrier "is a commercial enterprise that holds itself out to the public as offering to transport passengers or freight for a fee. A common carrier is generally

[17] Page 458.

required, by law, to transport freight or passengers...without refusal, if the approved fare or charge is paid."[18]

The Supreme Court's Analysis of "common carrier"

The Supreme Court set out these definitions in both ***Cook Tractor*** and ***Balloons Over the Rainbow***. As the latter case is the Court's most recent statement on common carrier status, we set it out at length.

> Although section 144.030 does not define "common carrier," this Court previously has ascertained the plain and ordinary meaning of "common carrier" under… [§ 144.030.2(3) and (20)]…. In doing so, this Court looked to a number of sources, including dictionary definitions, statutory definitions from related statutes, the state regulations of the Missouri Department of Revenue and prior Missouri case law and determined that the plain and ordinary meaning of "common carrier" is both well-established by Missouri case law and consistent with statutory and dictionary definitions.
>
> [*Webster's Third New Int'l Dictionary*] defines common carrier as "a carrier offering its services to all comers ...." Similarly, Black's Law Dictionary states that a "common carrier" is a "commercial enterprise that *holds itself out to the public* as offering to transport passengers or freight for a fee. A common carrier is generally required, by law, to transport freight or passengers ..., *without refusal*, if the approved fare or charge is paid." The director's regulations offer an almost identical regulation, defining a common carrier as "any person that holds itself out to the public as engaging in the transportation of passengers or property for hire [and is] required by law to transport passengers ... without refusal if the fare or charge is paid."
>
> Finally, [§ 390.020(6)], which regulates motor carriers and previously has been used by this Court to interpret section 144.030.2(3), defines a "common carrier" as "any person which holds itself out to the general public to engage in the transportation by motor vehicle of passengers or property for hire or compensation upon public highways and airlines engaged in intrastate commerce[.]" Common among these definitions is the requirement that to be a "common carrier" an entity must "hold itself out" to the public or "to all comers."

[18] Page 242.

> This Court has interpreted "common carrier" consistently with these dictionary, statutory, and regulatory definitions since its first interpretation of the term nearly 80 years ago. In [***State ex. rel. Anderson v. Witthaus***], this Court defined "common carrier" as "anyone who holds himself out to the public as ready to undertake for hire or reward the transportation of goods from place to place ... and so invites custom of the public, is in estimation of the law a 'common carrier.'"[19]

In ***Balloons Over the Rainbow***, the taxpayer did not qualify for common carrier status because, according to its president's testimony, it had the discretion to refuse to carry a customer. Therefore, the Court held that the taxpayer had not held itself out as willing to carry all people indifferently.[20]

> We read the Court's analysis as setting out these defining traits of common carriers:

- a carrier offering its services to all comers;
- a commercial enterprise that holds itself out to the public as offering to transport passengers or freight for hire or compensation; and
- a carrier that is generally required, by law, to transport freight or passengers, without refusal, if the approved fare or charge is paid.

In this case, JetSelect easily fulfills the first two traits. It offers its services to the public generally, and holds itself out as offering to transport passengers for hire or compensation, through:

- its website, jetselectaviation.com, where it offers worldwide private jet charter and flight services;
- a full-color brochure of its offerings;
- advertisements for its services in print (*Wall Street Journal*) and online air charter clearinghouse sites such as the "Air Charter Guide" and "Jet Charters;" and
- advertisements in social media such as Facebook and YouTube.

[19] ***Balloons Over the Rainbow***, at *8-9 (internal citations omitted).

[20] Id. at *10. The "all comers" requirement is sometimes stated as a common carrier's requirement to carry all people indifferently. ***Balloons Over the Rainbow*** at *10, *citing* ***Cook Tractor***, 187 S.W.3d at 874.

Advertising, such as JetSelect did, fulfills the "holding out" requirement.[21] Also, the parties stipulated that "JetSelect has never refused to carry any prospective customer once that customer has made payment of the charges quoted as long as there is an empty aircraft available to transport the customer or group."[22] That fact meets the "all comers" requirement, as opposed to the taxpayer in ***Balloons Over the Rainbow***, whose president testified that the business exercised discretion in accepting a paying customer.[23]

We consider the third defining trait next.

The Requirement that a Common Carrier Must be
Required by Law *to Transport Freight or Passengers,*
without Refusal, if the Approved Fare or Charge is Paid

In ***Balloons Over the Rainbow***, the Supreme Court stated that one of the requirements for a common carrier is that it must be "a carrier that is generally *required, by law,* to transport freight or passengers, without refusal, if the approved fare or charge is paid."[24] (Emphasis added.) As the Court noted,[25] this requirement is found in 12 CSR 10-110.300(2)(A).

FDA argues that JetSelect meets this requirement by publishing its rates and charges[26] and by not limiting its services to certain customers.[27] We disagree. Even assuming the validity of the argument, it does not address the real issue—whether it is *required*, *by law*, to transport freight or passengers, without refusal, if the approved fare or charge is paid. FDA ignores the difference between a carrier being required by law to do something and voluntarily doing that thing.

[21] ***Balloons Over the Rainbow*** at *9, *citing* ***Cook Tractor***, 187 S.W.3d at 873.
[22] Joint proposed stipulation of facts ¶ 29.
[23] ***Balloons Over the Rainbow*** at *9-10.
[24] *Id*. at *8-9.
[25] *Id*.
[26] Petitioner's legal brief p. 16.
[27] *Id*. at 18.

FDA also argues that JetSelect meets this requirement because JetSelect is required by 14 C.F.R. Part 382 to not discriminate against passengers. However, the regulation FDA cites is more limited than FDA claims. The title of 14 C.F.R. Part 382 states that it concerns "Nondiscrimination *on the Basis of Disability* in Air Travel." (Emphasis added.) Furthermore, 14 C.F.R. § 382.1, cited by FDA in its legal brief,[28] says:

> The purpose of [Part 382] is to carry out the Air Carrier Access Act of 1986, as amended. This rule prohibits both U.S. and foreign carriers from discriminating against passengers on the basis of disability; requires carriers to make aircraft, other facilities, and services accessible; and requires carriers to take steps to accommodate passengers with a disability.

The Air Carrier Access Act of 1986 is "[a]n Act to amend the Federal Aviation Act of 1958 to provide that prohibitions of discrimination against handicapped individuals shall apply to air carriers."[29] A law requiring a carrier to not discriminate against disabled people is not a law requiring a common carrier to accept anyone as a passenger who pays an approved fare or charge.

Even though FDA fails to show that JetSelect met this "required by law" requirement, we conclude that the requirement refers to laws that existed under a once-common regulatory structure. Under such a structure, a common carrier had a legal duty to both accept all comers who paid the fee or fare *and* impose only those fares or charges set out in its approved fee or fare structure. Until 1996, common carriers in Missouri had those legal duties. Specifically, until amendments were made by 1996 S.B. 780 to various provisions of Chapter 387:[30]

- section 387.050 required all common carriers to file rate and fare schedules with the Public Service Commission;

[28] pp. 19-20.
[29] Pub. L. 99-435.
[30] RSMo 1994.

- section 387.100 prohibited all common carriers from charging more or less than the rates, fares, and charges specified in the carrier's schedules; and

- section 387.110 prohibited common carriers from preferring one customer over another.

The 1996 amendments to these statutes changed the applicability of those statutes from common carriers to motor carriers,[31] and we found no other Missouri statute or regulation imposing these or similar requirements on common carriers. Therefore, we conclude that common carriers are no longer required by Missouri law to transport freight or passengers, without refusal, if the approved fare or charge is paid.

Also, neither the ***Cook Tractor*** nor the ***Balloons Over the Rainbow*** decision was based in any way on the "required by law" provision. Rather, the taxpayer in ***Cook Tractor*** was held not to be a common carrier because it did not hold itself out as a common carrier,[32] and the taxpayer in ***Balloons Over the Rainbow*** was held not to be a common carrier because it chose who it would carry, instead of accepting all comers.[33] Accordingly, the Court's statements of the "required by law" requirement constitute *dicta* in both cases because the requirement was not essential to the Court's opinions of the issues before it.[34]

Summary Regarding JetSelect's Common Carrier Status

After reviewing the Supreme Court's analyses of the requirements for common carrier status and applying them to JetSelect, we conclude that it meets the legal and lay dictionary definitions of the term and is consistent with the definitions in Chapter 390 and 12 CSR 10-110.300(2), as well as with the Court's application of the term in ***Balloons Over the Rainbow*** and ***Cook Tractor***. We also conclude that the "required by law" requirement, stated in ***Balloons***

[31] The term "motor carrier" includes both common and contract carriers. Section 390.020(18).
[32] ***Cook Tractor***, 187 S.W.3d at 874-75.
[33] ***Balloons Over the Rainbow*** at *9-10.
[34] ***Blunkall v. Heavy & Specialized Haulers, Inc***., 398 S.W.3d 534, 544 (Mo. App., S.D. 2013***); State ex rel. Anderson v. Hostetter***, 140 S.W.2d 21, 24 (Mo. banc 1940).

Over the Rainbow and 12 CSR 10-110.300(2)(A), no longer applies, as it refers to a now-superseded rule that common carriers had to both accept all comers and charge only approved fees or fares, and because the Court did not apply this requirement in ***Balloons Over the Rainbow*** or ***Cook Tractor***. Therefore, JetSelect is a common carrier under Missouri law.

Is Jet Select disqualified from being a common carrier if it is a contract carrier?

The Director argues, "JetSelect fits within the statutory definition of a contract carrier. This classification precludes FDA's claim of the common carrier exemption in § 144.030.2(20) for sales and use tax and supports the Director's decision to deny FDA's payment under protest."[35] In support of this argument, he states that in ***Cook Tractor***, "the Missouri Supreme Court…found that contract and private carriers do not qualify for Missouri sales and use tax exemptions for common carriers."[36]

However, the Director misstates the Court's holding. Instead of deciding whether the taxpayer was a common, contract, or private carrier, the Court restricted its analysis to whether Cook Tractor was or was not a common carrier. After applying that analysis, the Court concluded that "Cook Tractor was not entitled to a section 144.030.2(3) exemption for the purchases at issue *because the company failed to show that it operated as a common carrier when those purchases were made*."[37] (Emphasis added.) The Court did not consider the Director's argument that Cook Tractor was not entitled to the exemption because it was a contract or a private carrier.

[35] Respondent's statement of the case p. 11.
[36] *Id*.
[37] ***Cook Tractor***, 187 S.W.3d at 875.

The Director also made this argument, with the same result, in ***Rocky Mountain Helicopters, Inc. v. Director of Revenue***.[38] There, the taxpayer provided emergency air transport services to hospitals inside and outside Missouri. There, as here and in ***Cook Tractor***, the Director argued that the taxpayer was not a common carrier because it was a contract carrier.[39] And, as the Supreme Court did 15 years later in ***Cook Tractor***, this Commission did not consider or apply the Director's contract carrier argument, but based its decision on whether the taxpayer was or was not a common carrier.[40]

*A carrier can be a common **and** a contract carrier.*

The fact that neither the Supreme Court nor this Commission followed or applied the Director's contract carrier argument in the past does not, itself, invalidate the argument. That invalidation is shown by the fact that the common carrier and contract carrier categories are not mutually exclusive.

When it was first enacted in 1951,[41] § 390.020(5) defined "common carrier" much as it does now, as:

> any person which holds itself out to the general public to engage in the transportation by motor vehicle of passengers or property for hire or compensation upon the public highways[.[42]]

However, the 1951 version of § 390.020(6) defined "contract carrier" as"

> any person which, under individual contracts or agreements, engages in the transportation *(other than transportation referred to in subsection 5 of this section)* by motor vehicle of passengers or property for hire or compensation upon the public highways[.[43]]

---

[38] No. 90-001468RS (Missouri Admin. Hearing Comm'n, July 8, 1992, Otto, C.).
[39] ***Rocky Mountain Helicopters*** at *5.
[40] *Id.* This Commission concluded that Rocky Mountain Helicopters was a common carrier. Id. at *6.
[41] 1951 Mo. Laws 547.
[42] RSMo 1978.
[43] *Id.*

(Emphasis added.) The emphasized language refers to the definition of "common carrier" in the prior subsection. Therefore, by that language, contract carriers could not be common carriers. But in 1986, the legislature removed that language from the definition of "contract carrier."[44] When the legislature amends a statute, it is presumed to have intended to effect some change in the existing law.[45] In this case, the legislature obviously intended to define common and contract carriers as no longer being mutually exclusive.

However, the legislature continues to define "private carrier" in the current version of §390.020.2(23)[46] in a way that excludes common and contract carriers, as follows:

> any person engaged in the transportation of property or passengers by motor vehicle upon public highways, *but not as a common or contract carrier by motor vehicle*[.[47]]

(Emphasis added.) By the highlighted language in this definition of "private carrier," the legislature defines one class of carriers, in part, by excluding other classes of carriers. Accordingly, as we set out above, the legislature decided in 1986 that it would no longer define "contract carrier" as excluding common carriers, or "common carrier" as excluding contract carriers. However, the Director's position requires that the 1986 amendment to § 390.020.2 be considered a nullity, because (as he argues) common carriers cannot be contract carriers simply because the terms have different definitions. When applying a statute, we may not interpret any provision of it as being a nullity, but must give full effect to the statute's plain language.[48]

Also, courts in other jurisdictions have recognized for some time that the distinction between those categories of carriers was anything but clear. As early as 1886, courts (including

---

[44] 1986 H.B. 1428.

[45] ***Johnson v. Missouri Bd. of Probation & Parole***, 359 S.W.3d 500, 505 (Mo. App., W.D. 2012); ***Hogan v. Bd. of Police Comm'rs***, 337 S.W.3d 124, 130 (Mo.App., W.D. 2011).

[46] RSMo Supp. 2010. The statute reads as it did when enacted in 1951 by 1951 Mo. Laws 547, with minor, non-substantive modifications.

[47] The Director uses the same definition for "private carrier" in 12 CSR 10-110.300(2)(E).

[48] ***Schwab v. National Dealers Warranty, Inc***., 298 S.W.3d 87, 91 (Mo. App., E.D. 2009).

the United States Supreme Court) held that a carrier could act either as a contract or a common carrier, depending on its circumstances.[49]

Also, the Director has not provided, and we could not find, provisions in Chapter 144, Chapter 390, 12 CSR 10-110.300, or any reported Missouri opinions that require common and contract carriers to be mutually exclusive, or that define them as such. The two places in the current Missouri statutes, aside from § 390.020, where we find any distinction between common and contract carriers are § 390.051, which requires common carriers engaged in carrying household goods or passengers to obtain a certificate authorizing its operations, and § 390.061, which requires contract carriers to obtain a permit for the same purpose. Those provisions merely set out what paperwork each class of carrier must obtain to authorize its operations; they do not require that the classes of carriers be mutually exclusive.

Further, while the Director defined "contract carrier" in 12 CSR 10-110.300(2)(B), and explained in the "Purpose" clause of the regulation that it "explains what qualifies for the exemptions [contained in § 144.030.2(3), (10), (11), (20) and (30)]," there is no mention of "contract carrier" in those subsections or anywhere else in Chapter 144.

Finally, the parties' stipulated description of JetSelect's operations includes, word for word, portions of the definitions of both "common carrier" and "contract carrier" as found in 12 CSR 10-110.300(2)(A) and (B). That description reads: "JetSelect holds itself out to the general public as engaging in the transportation of passengers or property for hire under individual agreements without refusal if the fare or charge is paid…."[50]

---

[49] *See, e.g.*, ***Memphis & L R.R. Co. v. Southern Exp. Co***. ("Express Cases"), 117 U.S. 1, 3-4 (1886); ***United States v. Louisville & N.R. Co***., 221 F.2d 698, 700 (6th Cir. 1955), and ***Grace Line, Inc. v. Federal Maritime Bd.***, 280 F.2d 790, 791 (C.A.2 1960), *cited in Comment, Contract Carriage by Common Carriers Under the Shipping Act of 1916*, 70 Yale L.J. 1184, 1185 (1961).

[50] Joint stipulation ¶ 31. We incorporated this stipulation into our finding of fact number 21.

As stated above, the definition of "common carrier" in 12 CSR 10-110.300(2)(A) includes the following:

> any person that *holds itself out to the public as engaging in the transportation of passengers or property for hire*. A common carrier is required by law to transport passengers or property for others *without refusal if the fare or charge is paid*.

(Emphasis added.) And the definition of "contract carrier" in 12 CSR 10-110.300(2)(B) includes the following:

> any person *under individual* contracts or *agreements that engages in transportation of passengers or property for hire* or compensation.

(Emphasis added.) The emphasized portions of both definitions were put together, by stipulation of the parties, to describe what JetSelect does. This stipulated melding of the two definitions aptly illustrates that JetSelect's operations contain elements of both common and contract carriers.

For these reasons, we reject the Director's argument that JetSelect cannot be a common carrier on the ground that it is a contract carrier.

The fact that FDA enters into individual agreements with its customers does not disqualify FDA from being a common carrier.

The Director argues, correctly, that JetSelect entered into "discrete, negotiated contracts" with its customers. The customer controlled the aircraft, from where it departed, to where it flew, and the dates and times of the flight(s). It does not matter whether JetSelect used a "form contract" or had a rate schedule, as FDA argues; the fact that the customer controlled where and when the chartered aircraft flew is enough to make any such agreement between FDA and the customer an individual one.

Also, while FDA argues that acknowledged common carriers such as Southwest Airlines also enter into agreements with their passengers through contracts of carriage, those contracts of

carriage are not "individual agreements" as JetSelect enters into with its customers – where the customer designates the departure and destination points of the flights, the dates and times of those flights, and charters the entire aircraft for the customer's use.

But JetSelect's individual agreements, and any difference or similarity between them and a commercial airliner's contract of carriage, do not make JetSelect a contract carrier, notwithstanding the fact that "individualized agreements" are an element of contract carrier status under 12 CSR 10-110.300(2)(B). As the Director stipulated in the proposed joint findings of fact, JetSelect held itself out to the general public as engaging in the transportation of passengers or property for hire without refusal if the fare or charge is paid. Those actions qualify JetSelect as a common carrier according to the Supreme Court's analysis in ***Balloons Under the Rainbow*** and ***Cook Tractor***.

Can FDA be entitled to the common carrier exemption because JetSelect is a common carrier?

The Aircraft was sold to FDA, who paid use tax after the aircraft was brought into Missouri. FDA, however, was not the common carrier—JetSelect was. FDA's argument for why it is entitled to the common carrier exemption, even though it was not the common carrier, is set out in its legal brief as follows:

> A lease of tangible personal property is considered a sale of such article. Section 144.010.1(3), RSMo.[51] When a purchase of tangible personal property or service subject to tax is made for the purposes of resale, such purchase is exempt from the Missouri sales tax law. Section 144.018.1(4), RSMo. The lease to JetSelect falls under § 144.018.1(4), RSMo., as it is subject to tax but exempt from the Missouri sales tax law.[52]

[51] RSMo Supp. 2010. FDA's brief refers to the statute as § 144.010.1(4), which is where the current version of the statute is located.

[52] FDA's legal brief p. 6.

FDA therefore argues that it did not owe use tax on the Aircraft purchase because its lease of the Aircraft to JetSelect was considered a "sale" under § 144.010.1(3). And, because it was a "sale," its subsequent "resale" to JetSelect would have been exempt from tax under § 144.018.1(4) because, had it been a sale, it would have qualified for the "sale of aircraft to a common carrier for use in interstate commerce" exclusion of § 144.030.2(20) that we discussed above. We examine each element of FDA's argument below.

Is a lease of tangible personal property a "sale" under § 144.010.1(3)?

Section 144.010.1(3) does not state, or even imply, that "[a] lease of tangible personal property is considered a sale of such article." The statute states:

> "Gross receipts", except as provided in section 144.012, means the total amount of the sale price of the sales at retail including any services other than charges incident to the extension of credit that are a part of such sales made by the businesses herein referred to, capable of being valued in money, whether received in money or otherwise; except that, the term "gross receipts" shall not include the sale price of property returned by customers when the full sale price thereof is refunded either in cash or by credit. In determining any tax due under sections 144.010 to 144.525 on the gross receipts, charges incident to the extension of credit shall be specifically exempted. For the purposes of sections 144.010 to 144.525 the total amount of the sale price above mentioned shall be deemed to be the amount received. It shall also include the lease or rental consideration where the right to continuous possession or use of any article of tangible personal property is granted under a lease or contract and such transfer of possession would be taxable if outright sale were made and, in such cases, the same shall be taxable as if outright sale were made and considered as a sale of such article, and the tax shall be computed and paid by the lessee upon the rentals paid[.]

However, while § 144.010.1(3) says nothing about leases of tangible personal property being considered as sales, the statute has been cited in connection with the proposition of law

that FDA advocates. In ***Brambles Indus., Inc. v. Director of Revenue***,[53] the taxpayer leased pallets to its customer for use in shipping its products to customers. The taxpayer claimed that the pallet rentals were "resales" for purposes of § 144.010(8).[54] The Court, citing its prior decision in ***Sipco, Inc. v. Director of Revenue***,[55] agreed, saying:

> [J]ust as packaging material is purchased for resale when it is purchased for the purpose of transferring the right to use it in return for consideration, leases of packaging material are excluded from sales tax where the material is leased for the purpose of transferring the right to use the packaging material to a subsequent purchaser for valuable consideration. Thus, it is not necessary…for title or ownership of the property to be transferred to the subsequent purchaser in order for the lease proceeds to be excluded from tax.[56]

Therefore, the Court held that Brambles had, by leasing the pallets, transferred the right to use them, and thus "resold" them for purposes of excluding the lease proceeds from taxation.

However, the proceeds in ***Brambles Industries*** were obtained by Brambles from its customer. Brambles collected tax on those transactions, remitted them to the Director, and then filed a claim for their refund. In this case, the transaction on which FDA paid tax was the bringing of the Aircraft into Missouri, and the amount of the tax was based on the purchase price it paid to Bombardier. Given the absence of any other application of § 144.010.1(3) in the manner FDA tries to apply it, we find no support for FDA's assertion that its lease of the Aircraft to JetSelect was a "sale" pursuant to § 144.010.1(3).

---

[53] 981 S.W.2d 568 (Mo. banc 1998).

[54] RSMo Supp. 1996. The current version is at § 144.010(11), RSMo Supp. 2013.

[55] 875 S.W.2d 539 (Mo. banc 1994).

[56] ***Brambles Industries***, 981 S.W.2d at 570. The reference to packaging material is a reference to the facts of ***Sipco***, where the item in question was packaging material.

Application of § 144.018.1(4)

The second sentence of FDA's legal argument is, we believe, an inadvertent misstatement. It should read, "[w]hen a purchase of tangible personal property or service subject to tax is made for the purposes of resale, such purchase is exempt from the Missouri sales tax law *if it is subject to tax but exempt under [Chapter 144]*." That additional language is the language of subdivision (4) of 144.018.1, the statute FDA cites. Section 144.018.1(4) provides in relevant part:

> Notwithstanding any other provision of law to the contrary,…when a purchase of tangible personal property or service subject to tax is made for the purpose of resale, such purchase shall be either exempt or excluded under this chapter if the subsequent sale is:
>
> * * *
>
> (4) Subject to tax but exempt under this chapter[.]

If FDA's lease of the Aircraft to JetSelect had been a sale, then that sale would have been "a purchase of tangible personal property or service subject to tax . . . made for the purpose of resale." And in that event, the "sale" would not only have been the "resale" in a "sale for resale," but one "subject to tax but exempt under [Chapter 144]," specifically § 144.030.2(20), as incorporated into the use tax by § 144.615(3). But, for the reasons stated above under "Is a lease of tangible personal property a sale under § 144.010.1(3)," FDA failed to show that it was a sale. Because of that failure, FDA's other arguments—that JetSelect was a common carrier under Missouri law, that a "sale" of the aircraft to JetSelect would, had it been an actual sale, have been exempt from tax under § 144.030.2(20), and that because of that exemption, FDA is entitled to the fruits of that exemption—fail, and FDA is not entitled to the exemption.

The Director's Lack of a Position on this Issue

Neither the Director's oral argument nor his statement of the case, proposed findings of fact, conclusions of law, and brief addresses this portion of FDA's argument. We might consider the issue waived for such failure, but for three factors: First, as stated above, our obligation in this case is not merely to review the Director's decision, but to apply existing law to the facts as we find them and determine the taxpayer's lawful tax liability for the transaction at issue. Second, FDA's arguments as discussed here are set out in paragraph 8 (and to a lesser extent, paragraph 9) of its complaint, and the Director denied the allegations in both paragraphs in his answer, thus putting those matters in dispute. Third, FDA did not raise the Director's failure to contest its argument as a ground for waiver or for any other reason.

Here, we applied existing law as cited by FDA, looked beyond FDA's argument to find a case (***Brambles Industries***) where a similar argument had been made successfully, but concluded that that case did not support FDA's position.

Summary

Five Delta Alpha, LLC, is not entitled to a refund of use tax because it failed to meet its burden to show that it was entitled to the refund.

SO ORDERED on May 13, 2014.

\s\ Sreenivasa Rao Dandamudi
SREENIVASA RAO DANDAMUDI
Commissioner